

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR  
HOUSE BILL 309

**48TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2008**

AN ACT

RELATING TO ETHICS; ENACTING THE STATE ETHICS COMMISSION ACT;  
CREATING THE STATE ETHICS COMMISSION; PROVIDING POWERS AND  
DUTIES; PROVIDING FOR ANNUAL ETHICS TRAINING AND THE  
PUBLICATION OF ETHICS GUIDES; REQUIRING THE DEVELOPMENT OF A  
PROPOSED ETHICS CODE FOR THE EXECUTIVE BRANCH; GRANTING  
SUBPOENA POWER THROUGH THE ATTORNEY GENERAL; ALLOWING ISSUANCE  
OF ADVISORY OPINIONS RELATED TO CERTAIN ETHICS VIOLATIONS;  
PROVIDING FOR THE FILING OF COMPLAINTS AGAINST STATE OFFICIALS,  
STATE EMPLOYEES, GOVERNMENT CONTRACTORS AND LOBBYISTS FOR  
CERTAIN ETHICS VIOLATIONS; ESTABLISHING INVESTIGATIONS OF  
COMPLAINTS FOR CERTAIN ETHICS VIOLATIONS; MAKING AN  
APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the

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1 "State Ethics Commission Act".

2 Section 2. DEFINITIONS.--As used in the State Ethics  
3 Commission Act:

4 A. "commission" means the state ethics commission;

5 B. "commissioner" means a person appointed to the  
6 state ethics commission;

7 C. "ethics violation" means any action that amounts  
8 to a violation of the Gift Act, the Governmental Conduct Act,  
9 the Procurement Code, the Lobbyist Regulation Act, the  
10 Financial Disclosure Act or Chapter 1, Article 19 NMSA 1978;

11 D. "government contractor" means a person who has a  
12 contract with a state agency pursuant to the Procurement Code.  
13 "Government contractor" also includes any person who has  
14 submitted a competitive sealed proposal or competitive sealed  
15 bid for a contract with a state agency;

16 E. "legislative body" means the house of  
17 representatives or the senate;

18 F. "lobbying" means attempting to influence:

19 (1) a decision related to any matter to be  
20 considered or being considered by the legislative branch of  
21 state government or any legislative committee or to any  
22 legislative matter requiring action by the governor or awaiting  
23 action by the governor; or

24 (2) an official action;

25 G. "lobbyist" means a person who is compensated for

1 the specific purpose of lobbying; is designated by an interest  
2 group or organization to represent it on a substantial or  
3 regular basis for the purpose of lobbying; or who, in the  
4 course of the person's employment, is engaged in lobbying on a  
5 substantial or regular basis. "Lobbyist" does not include:

6 (1) a person who appears on the person's own  
7 behalf in connection with legislation or an official action;

8 (2) an elected or appointed officer of the  
9 state, a political subdivision of the state or an Indian  
10 nation, tribe or pueblo who is acting in the officer's official  
11 capacity;

12 (3) an employee of the state or a political  
13 subdivision of the state, specifically designated by an elected  
14 or appointed officer, who appears before a legislative  
15 committee or in a rulemaking proceeding only to explain the  
16 effect of legislation or a rule on that employee's agency or  
17 political subdivision; provided that the elected or appointed  
18 officer keeps the designation for public inspection and files  
19 it with the secretary of state;

20 (4) a designated member of the staff of an  
21 elected state official; provided that the elected state  
22 official keeps the designation for public inspection and files  
23 it with the secretary of state;

24 (5) a legislator or legislative staff member;

25 (6) a witness called by a legislative

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1 committee or administrative agency to appear before it in  
2 connection with legislation or an official action;

3 (7) a person who provides only oral or written  
4 public testimony in connection with a legislative committee or  
5 in a rulemaking proceeding and whose name and the interest on  
6 behalf of which the person testifies have been clearly and  
7 publicly identified; or

8 (8) a publisher, owner or employee of the  
9 print media, radio or television, while gathering or  
10 disseminating news or editorial comment to the general public  
11 in the ordinary course of business;

12 H. "official action" means an action or nonaction  
13 of a state official or state agency, board or commission acting  
14 in a rulemaking proceeding;

15 I. "respondent" means a state official, state  
16 employee, government contractor or lobbyist who is the subject  
17 of a complaint filed with the commission;

18 J. "state agency" means any department, commission,  
19 council, board, committee, institution, agency, government  
20 corporation, educational institution or official of the  
21 executive, legislative or judicial branch of government of the  
22 state;

23 K. "state employee" means an employee of the  
24 executive, legislative or judicial branch of the state; and

25 L. "state official" means a person elected or

1 appointed to an office of the executive, judicial or  
2 legislative branch of the state.

3 Section 3. STATE ETHICS COMMISSION CREATED--MEMBERSHIP--  
4 TERMS--REMOVAL.--

5 A. The "state ethics commission" is created as an  
6 adjunct agency. The commission consists of the following ten  
7 commissioners:

8 (1) four commissioners appointed by the  
9 governor, no more than two of whom shall be of the same  
10 political party and at least one commissioner shall be  
11 appointed from each congressional district;

12 (2) one commissioner appointed by the  
13 president pro tempore of the senate;

14 (3) one commissioner appointed by the minority  
15 floor leader of the senate;

16 (4) one commissioner appointed by the speaker  
17 of the house of representatives;

18 (5) one commissioner appointed by the minority  
19 floor leader of the house of representatives; and

20 (6) two commissioners appointed by the chief  
21 justice of the supreme court, who shall not be of the same  
22 political party and shall not be appointed from the same  
23 congressional district.

24 B. Appointments shall be made in a manner that  
25 meets the following requirements:

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1 (1) all commissioners shall be residents of  
2 New Mexico;

3 (2) no more than five commissioners shall be  
4 registered members of the same political party and no person  
5 whose party registration changed in the year prior to  
6 appointment shall be appointed to the commission; and

7 (3) the appointing authorities shall give due  
8 consideration to achieving geographical representation from  
9 across the state.

10 C. Commissioners shall be appointed for staggered  
11 terms of four years. Upon initial appointment of the  
12 commission, the commissioners shall draw lots to determine  
13 which three commissioners will serve an initial term of two  
14 years, which three commissioners will serve an initial term of  
15 three years and which four commissioners will serve an initial  
16 term of four years; thereafter, all commissioners will serve  
17 four-year terms. A person shall not serve as a commissioner  
18 for more than two consecutive terms.

19 D. The commission shall select a chair, vice chair  
20 and other officers it deems necessary.

21 E. Six commissioners constitute a quorum for the  
22 transaction of business. No action may be taken by the  
23 commission unless at least six members concur.

24 F. A vacancy on the commission shall be filled by  
25 appointment of the appointing authority for that commissioner's

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1 position for the remainder of the unexpired term. A  
2 commissioner may only be removed for incompetence, neglect of  
3 duty or malfeasance in office. A proceeding for the removal of  
4 a commissioner may be commenced by the commission or by the  
5 attorney general upon the request of the commission. The  
6 supreme court of the state of New Mexico has exclusive  
7 jurisdiction over proceedings to remove commissioners, and its  
8 decision shall be final. A commissioner shall be given notice  
9 of hearing and an opportunity to be heard before the  
10 commissioner is removed.

11 G. During a commissioner's service, a commissioner  
12 shall not:

13 (1) hold or seek an elective public office, an  
14 appointed public position or an office in a political party; or

15 (2) be a government contractor or a lobbyist.

16 H. Commissioners shall disqualify themselves from a  
17 commission proceeding that involves the appointing authority  
18 who appointed the commissioner to the commission or when a  
19 commissioner has a conflict of interest. Commissioners who  
20 disqualify themselves shall state the reason for the  
21 disqualification. If the propriety of a commissioner's  
22 participation in a particular matter is questioned due to a  
23 conflict of interest, the commission may disqualify that  
24 commissioner from participation in a commission proceeding. A  
25 disqualified commissioner shall not participate in any

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1 proceedings with reference to the matter from which the  
2 commissioner is disqualified, and the commissioner shall be  
3 excused from that portion of any meeting at which the matter is  
4 discussed. If four or more commissioners are disqualified from  
5 participating in a proceeding, the remaining commissioners  
6 shall appoint temporary commissioners to participate in that  
7 proceeding. Appointments of temporary commissioners shall be  
8 made by majority vote of the remaining commissioners and in  
9 accordance with the geographical representation and political  
10 party membership requirements of Subsections A and B of this  
11 section.

12 I. For a period of one calendar year following the  
13 expiration of a commissioner's term or following the  
14 resignation or removal of the commissioner, the commissioner  
15 shall not:

16 (1) hold or seek an elective public office or  
17 an appointed public position;

18 (2) represent a respondent, unless appearing  
19 on the commissioner's own behalf; or

20 (3) accept employment or otherwise provide  
21 services to a person or entity that is a respondent, unless the  
22 commissioner accepted employment or provided services to the  
23 person or entity prior to the filing of a complaint against the  
24 person or entity.

25 J. Commissioners are entitled to receive per diem

1 and mileage as provided in the Per Diem and Mileage Act and  
2 shall receive no other compensation, perquisite or allowance.

3 K. The commission shall meet as necessary to carry  
4 out its duties pursuant to the State Ethics Commission Act.

5 Section 4. COMMISSION--POWERS--DUTIES.--

6 A. The commission shall:

7 (1) receive and investigate complaints  
8 alleging ethics violations against state officials, state  
9 employees, government contractors and lobbyists;

10 (2) report findings of probable cause that a  
11 respondent's conduct constituted an ethics violation to the  
12 respondent's appointing authority, employer, appropriate state  
13 agency or appropriate legislative body;

14 (3) compile, maintain and provide public  
15 access to an index of all advisory opinions, complaints and  
16 reports required to be made public pursuant to the State Ethics  
17 Commission Act;

18 (4) draft a proposed code of ethics for all  
19 state officials and state employees of the executive branch and  
20 submit the proposed code to each elected state official of the  
21 executive branch for adoption;

22 (5) compile, adopt, publish and provide to all  
23 state officials, state employees, government contractors and  
24 lobbyists an ethics guide that clearly and plainly explains the  
25 ethics requirements set forth in state law;

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1 (6) compile, adopt, publish and provide to all  
2 state officials, state employees, government contractors and  
3 lobbyists a business ethics guide that clearly and plainly  
4 explains the ethics requirements set forth in state law as they  
5 relate to conducting business with the state;

6 (7) offer annual ethics training to all state  
7 officials, state employees, government contractors and  
8 lobbyists;

9 (8) develop, adopt and promulgate all  
10 procedural rules necessary to implement and administer the  
11 provisions of the State Ethics Commission Act, including rules  
12 of procedure for investigations conducted by the commission;

13 (9) employ an executive director;

14 (10) submit an annual report of its  
15 activities, including any recommendations regarding state  
16 ethics laws or the scope of its powers and duties, in December  
17 of each year to the governor, the legislature and the chief  
18 justice of the supreme court; and

19 (11) promulgate rules for the recusal of  
20 members to avoid the appearance of impropriety and conflicts of  
21 interest.

22 B. The commission may:

23 (1) initiate complaints alleging ethics  
24 violations against state officials, state employees, government  
25 contractors and lobbyists;

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1 (2) issue public reprimands or censures or  
2 recommend disciplinary actions in accordance with the  
3 provisions of the State Ethics Commission Act for ethics  
4 violations committed by state officials of the executive branch  
5 and state employees;

6 (3) pursuant to governing court rules and the  
7 State Ethics Commission Act, request that the attorney general  
8 issue subpoenas as necessary to require the attendance of  
9 witnesses and the production of accounts, books, papers,  
10 records and other documents relevant to an investigation  
11 conducted by the commission;

12 (4) issue advisory opinions to state  
13 officials, state employees, government contractors and  
14 lobbyists in accordance with the provisions of the State Ethics  
15 Commission Act; and

16 (5) contract for the provisions of goods and  
17 services.

18 Section 5. EXECUTIVE DIRECTOR--DUTIES--EMPLOYMENT.--

19 A. The executive director of the commission shall:

20 (1) be employed by, report directly to and  
21 serve at the pleasure of the commission;

22 (2) hire a general counsel for the commission  
23 and all other personnel as may be necessary to carry out the  
24 responsibilities of the commission;

25 (3) perform all investigations on behalf of

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1 the commission;

2 (4) bring complaints and investigation results  
3 before the commission for consideration;

4 (5) prepare an annual budget for the  
5 commission and submit it to the commission for approval; and

6 (6) make recommendations to the commission of  
7 proposed rules or legislative changes needed to provide better  
8 administration of the State Ethics Commission Act.

9 B. The executive director of the commission may  
10 administer oaths and take depositions to the same extent and  
11 subject to the same limitations as would apply if the  
12 deposition were held pursuant to the discovery rules in a civil  
13 action in the district court.

14 C. For a period of one calendar year immediately  
15 following the executive director's employment with the  
16 commission, the executive director shall not:

17 (1) hold or seek an elective public office, an  
18 appointed public position or public employment;

19 (2) represent a respondent, unless appearing  
20 on the executive director's own behalf; or

21 (3) accept employment or otherwise provide  
22 services to a person or entity that is a respondent, unless the  
23 executive director accepted employment or provided services to  
24 the person or entity prior to the filing of a complaint against  
25 the person or entity.

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1           Section 6. COMMISSION--ADVISORY OPINIONS.--

2           A. The commission may issue an advisory opinion to  
3 a state official, state employee, government contractor or  
4 lobbyist on matters relating to a specific set of circumstances  
5 involving ethics violations. Unless amended or revoked, an  
6 advisory opinion issued by the commission shall be binding on  
7 the commission in any subsequent commission proceedings  
8 concerning the person who requested the opinion; provided that  
9 the person acted in good faith and in reliance upon the  
10 opinion.

11           B. The commission shall promulgate rules for  
12 issuing advisory opinions; provided that:

13                   (1) advisory opinions shall be requested in  
14 writing and identify a specific set of circumstances involving  
15 an ethics issue;

16                   (2) all requests to the commission for  
17 advisory opinions are confidential; and

18                   (3) the commission may publish an advisory  
19 opinion after omitting the name of the requesting state  
20 official, state employee, government contractor or lobbyist.

21           Section 7. COMMISSION--COMPLAINTS--INVESTIGATIONS--  
22 FINDINGS AND RECOMMENDATIONS--REPORTS REQUIRED--CRIMINAL  
23 REFERRAL REQUIRED.--

24           A. A complaint of an alleged ethics violation  
25 committed by a state official, state employee, government

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1 contractor or lobbyist may be:

2 (1) filed with the commission by a person who  
3 has actual knowledge of an alleged ethics violation; or

4 (2) initiated by the commission upon receipt  
5 of evidence deemed sufficient by the commission of an alleged  
6 ethics violation.

7 B. A person who files a complaint with the  
8 commission shall sign the complaint under penalty of false  
9 statement and set forth in detail the specific charges against  
10 the state official, state employee, government contractor or  
11 lobbyist and the factual allegations that support the charges.  
12 Together with the complaint, a person shall submit to the  
13 commission any evidence that the person has that supports the  
14 complaint. Evidence may include documents, records and the  
15 names of witnesses. The commission may prescribe the forms on  
16 which complaints are to be filed.

17 C. The chair of the commission shall sign a  
18 complaint initiated by the commission, and the complaint shall  
19 set forth in detail the specific charges against the state  
20 official, state employee, government contractor or lobbyist and  
21 the factual allegations that support the charges.

22 D. Upon receipt of a complaint filed or initiated  
23 pursuant to this section, the executive director of the  
24 commission shall examine the complaint and make an initial  
25 determination whether the conduct alleged in the complaint is

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1 within the jurisdiction of the commission and warrants  
2 investigation. The executive director shall bring all  
3 complaints before the commission and make recommendations to  
4 the commission regarding whether to proceed with investigations  
5 of the complaints.

6 E. The commission may dismiss complaints that are  
7 frivolous, unfounded or outside the jurisdiction of the  
8 commission. If the commission determines there is sufficient  
9 cause to proceed with the investigation of a complaint, the  
10 executive director shall initiate an investigation to determine  
11 whether probable cause may exist to believe the respondent's  
12 alleged conduct constituted an ethics violation. As soon as  
13 practicable, the executive director shall notify the person who  
14 filed the complaint and the respondent of the disposition of  
15 the complaint. The executive director shall also notify the  
16 respondent of the general nature of the complaint and the  
17 investigation.

18 F. As part of the investigation, the executive  
19 director may interview witnesses and examine books, documents,  
20 records and papers reasonably related to the complaint. All  
21 testimony in an investigation shall be under oath, and the  
22 respondent shall have the right to be represented by legal  
23 counsel. If the executive director determines that the  
24 testimony of any person or the production of books, documents,  
25 records or papers is required in the investigation, the

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1 executive director shall request that the commission request  
2 the attorney general to issue the appropriate subpoena.

3 G. The commission may refer to the attorney general  
4 a confidential request to compel the production of books,  
5 records and papers pertinent to the investigation of a  
6 complaint conducted pursuant to this section. The attorney  
7 general may issue a subpoena that shall state with reasonable  
8 certainty the nature of the investigation, the nature of the  
9 information required to be produced, the time and place where  
10 information shall be produced and the consequences of failure  
11 to obey the subpoena. After service of a subpoena upon a  
12 person, if the person neglects or refuses to comply with the  
13 subpoena, the attorney general may apply to the district court  
14 where the custodian of the documents is located for an order  
15 compelling compliance. Any request for a subpoena pursuant to  
16 this section, the issuance of a subpoena and compliance or  
17 noncompliance with a subpoena shall be kept confidential.

18 H. The executive director shall present a written  
19 report of the investigation to the commission. The respondent  
20 and the respondent's legal counsel may attend and participate  
21 in the meeting, and the executive director shall provide  
22 reasonable notice to the respondent in writing of the date,  
23 time and place of the meeting. Notwithstanding the provisions  
24 of the Open Meetings Act, meetings of the commission held for  
25 the purpose of an investigation conducted pursuant to this

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1 section are closed to the public.

2 I. If the commission finds that, based on the facts  
3 in the investigation report and the facts alleged in the  
4 complaint, probable cause exists to believe that the  
5 respondent's alleged conduct constituted an ethics violation,  
6 the commission shall issue a written report of its findings.  
7 The report shall include findings of fact and conclusions of  
8 law. If the respondent is a state official of the executive  
9 branch or state employee of the executive branch, the written  
10 report may include a public reprimand or censure regarding the  
11 respondent's behavior or recommendations for disciplinary  
12 action against the respondent.

13 J. The commission shall publicly disclose a report  
14 issued pursuant to Subsection I of this section. The  
15 commission shall also transmit the report and provide all  
16 evidence collected during its investigation to the respondent,  
17 the attorney general and the:

18 (1) respondent's appointing authority if the  
19 respondent is a state official appointed to an office of the  
20 executive branch;

21 (2) appropriate legislative body, in the care  
22 of the legislative council service, if the respondent is a  
23 legislator;

24 (3) judicial standards commission if the  
25 respondent is a judge or a justice;

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1 (4) appropriate state agency if the respondent  
2 is a state employee;

3 (5) respondent's employer if the respondent is  
4 a lobbyist; or

5 (6) state agency with which the respondent has  
6 a government contract if the respondent is a government  
7 contractor.

8 K. If the commission finds that, based on the facts  
9 in the investigation report and the facts alleged in the  
10 complaint, probable cause does not exist to believe that the  
11 respondent's alleged conduct constituted an ethics violation,  
12 the commission shall dismiss the complaint and provide a report  
13 of its finding in writing to the respondent no later than five  
14 days after the finding is made. The report shall include  
15 findings of fact and conclusions of law. A commission report  
16 issued pursuant to this subsection shall not be public except  
17 upon the request of the respondent.

18 Section 8. COMMISSION INVESTIGATIONS--CONFIDENTIALITY.--  
19 All complaints, files, records and communications collected by  
20 the commission that pertain to investigations of ethics  
21 violations are confidential and not subject to the provisions  
22 of the Inspection of Public Records Act. The commission or any  
23 person who receives the evidence collected in a commission  
24 investigation pursuant to Subsection G of Section 7 of the  
25 State Ethics Commission Act shall not disclose the complaints,

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1 files, records and communications unless:

2 A. disclosure is required pursuant to the  
3 provisions of the State Ethics Commission Act;

4 B. they are offered into evidence at any judicial,  
5 legislative or administrative proceeding;

6 C. disclosure is required by law or ordered by a  
7 court; or

8 D. the respondent files with the commission a  
9 written waiver of confidentiality.

10 Section 9. CRIMINAL VIOLATIONS--REFERRAL REQUIRED.--If  
11 the commission finds at any time that the respondent's conduct  
12 may amount to a criminal violation of state law, the commission  
13 shall immediately refer the matter to the attorney general or  
14 an appropriate district attorney. The commission shall provide  
15 the attorney general or district attorney with all evidence  
16 collected during its investigation that may be used in a  
17 criminal proceeding. Nothing in this subsection shall prevent  
18 the commission from taking any action otherwise provided in the  
19 State Ethics Commission Act.

20 Section 10. COMPLAINTS AND INVESTIGATIONS--TIME  
21 LIMITATIONS.--

22 A. If the commission has not scheduled a meeting  
23 concerning the disposition of a complaint within ninety days  
24 after the complaint is received or initiated by the commission  
25 or has not disposed of the complaint within twelve months after

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1 the complaint was received or initiated, the executive director  
2 shall, as soon as practicable, report to the commission the  
3 progress and status of the investigation. The commission may  
4 dismiss the complaint or instruct the executive director to  
5 continue the investigation of the complaint. Unless the  
6 commission dismisses the complaint, the executive director  
7 shall report to the commission every six months thereafter on  
8 the progress and status of the investigation.

9 B. Upon a dismissal or decision to continue an  
10 investigation of a complaint pursuant to this section, the  
11 commission shall notify the respondent in writing of its  
12 action. The commission shall not publicly disclose its action  
13 except upon the request of the respondent.

14 Section 11. PROHIBITED ACTIONS.--

15 A. A person shall not take or threaten to take any  
16 retaliatory, disciplinary or other adverse action against  
17 another person who in good faith:

18 (1) files a complaint with the commission  
19 alleging an ethics violation against a state official, state  
20 employee or lobbyist; or

21 (2) provides testimony, records, reports or  
22 other information to the commission during an investigation  
23 conducted pursuant to the State Ethics Commission Act.

24 B. Nothing in the State Ethics Commission Act  
25 precludes civil actions or criminal sanctions for libel,

1 slander or other civil or criminal claims against a person who  
2 files a false claim under that act.

3 Section 12. TEMPORARY PROVISION--REPORT ON EXTENSION OF  
4 STATE ETHICS COMMISSION JURISDICTION TO LOCAL GOVERNMENTS.--By  
5 January 1, 2010, the state ethics commission shall submit a  
6 report to the governor, the legislature and the chief justice  
7 of the supreme court regarding the extension of state ethics  
8 commission jurisdiction to elected and appointed officials and  
9 employees of counties, municipalities and school districts.  
10 The report shall include and make recommendations on:

11 A. a detailed plan formulated by the commission for  
12 implementation of an extension of its jurisdiction, including a  
13 proposed timeline;

14 B. the estimated number of additional employees and  
15 the amount and type of resources needed by the state ethics  
16 commission to carry out its powers and duties if its  
17 jurisdiction were extended;

18 C. all estimated budget increases needed and the  
19 estimated annual budget for the state ethics commission if its  
20 jurisdiction were extended; and

21 D. any changes that are needed to existing law.

22 Section 13. APPROPRIATION.--Five hundred thousand dollars  
23 (\$500,000) is appropriated from the general fund to the state  
24 ethics commission for expenditure in fiscal year 2009 to carry  
25 out the provisions of the State Ethics Commission Act. Any

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1 unexpended or unencumbered balance remaining at the end of  
2 fiscal year 2009 shall revert to the general fund.

3 Section 14. EFFECTIVE DATES.--

4 A. The effective date of the provisions of Sections  
5 1 through 5, 8 and 11 through 13 of this act is July 1, 2008.

6 B. The effective date of the provisions of Sections  
7 6, 7, 9 and 10 of this act is January 1, 2009.